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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1058

EDWARD F. O'BRIEN *et al.*,

Appellants,

against

ALBERT SKINNER, Sheriff, Monroe County, *et al.*,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK.

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT OF MOTION

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Questions Presented

1. Does New York State Election Law, § 117-a deny appellants equal protection of the law insofar as section 117-a provides for absentee ballots for persons who are unable to appear personally at a polling place of the election district in which they are qualified to vote because of illness or physical disability but does not provide for absentee voting by appellants who are incarcerated in a county jail and who are either awaiting trial or are convicted misdemeanants?

2. Does New York State Election Law, § 153-a deny appellants equal protection of the law insofar as section 153-a provides for absentee voter registration by persons who are unable to appear personally for registration because of confinement at home or in a hospital or institution because of illness or physical disability but does not provide for absentee registration by appellants who are incarcerated in a county jail and who are either awaiting trial or are convicted misdemeanants?

The New York Court of Appeals answered each question in the negative (*O'Brien v. Skinner*, 31 NY2d 317, 319).

Constitution and Statutes Involved

New York State Constitution, Article II, § 2:

"The legislature may, by general law, provide a manner in which, and the time and place at which, qualified voters who, on the occurrence of any election, may be absent from the county of their residence or, if residents of the City of New York, from the city, and qualified voters who, on the occurrence of any election, may be unable to appear personally at the polling place because of illness or physical disability, may vote and for the return and canvass of their votes."

New York State Election Law, § 117-a(1) provides:

“A qualified voter, who, on the occurrence of any general election, may be unable to appear personally at the polling place of the election district in which he is a qualified voter because of illness or physical disability, may also vote as an absentee voter under this chapter; * * *.”

New York State Election Law, § 153(1) (subject matter formerly contained in Election Law, § 153-a which was repealed by Laws of 1972, ch. 962, eff. Jan. 1, 1973):

“A person who is unable to appear personally for registration on all of the days for local registration (a) because he is confined to home or in a hospital or institution because of illness or physical disability or (b) because his duties, occupation or business require him to be outside the county of residence, or if a resident of the City of New York, outside said city, on such days, may be registered in the manner provided by this section.”

Statement

The appellants were all detainees in the Monroe County jail when they instituted this proceeding to obtain absentee registration and ballots for the 1972 General Election. The appellants included persons who were convicted misdemeanants as well as those who were incarcerated while awaiting trial. The Monroe County election officials declined to establish a polling place in the jail or to permit absentee registration and balloting for the appellants upon the ground that there was no statutory authorization therefor.

Neither the State of New York nor any official thereof is a party to this proceeding. The State was granted permission to appear *amicus curiae* in the argument of the appeal in the New York Court of Appeals.

The New York Court of Appeals (*Matter of O'Brien v. Skinner*, 31 N Y 2d 317), disposed of appellants' attempt to avail themselves of the provisions of New York State Election Law, §§ 117-a and 153-a (quoted *supra*) by holding that these sections required that the applicant "be medically disabled by reason of some malady or other physical impairment. Under the circumstances, the fact of confinement to a penal institution would not entitle a voter or registrant to avail himself of the absentee provisions." (*id.* at p. 319).

Turning to the constitutional issue which was raised, the Court noted that sections 117-a and 153-a "set forth no voter qualification nor restriction which, by its terms would deny the franchise to any group otherwise qualified to vote" (*id.* at p. 320). The Court further stated that the statutes in question do not have a direct impact on the appellants' right to vote but rather on the right to absentee ballots. Consequently, the Court applied the "reasonableness" test (citing *McDonald v. Board of Election*, 394 U. S. 802), and concluded:

"Under the circumstances, and in view of the Legislature's failure to extend these absentee provisions to others similarly disadvantaged, it hardly seems plausible that petitioners' right to vote has been arbitrarily denied them." (31 N Y 2d at pp. 320, 321)

ARGUMENT

The New York State Court of Appeals decision in accord with the law previously established by this Court, properly held that there has been no denial of appellants' constitutional rights.

A. The appeal should be dismissed because it presents no substantial Federal question.

The questions raised by the appellants have clearly been foreclosed by the decisions of this Court.

The argument that a polling place be established within the county jail is not a viable one in view of this Court's decisions that the States have the right to require that persons presenting themselves to vote be *bona fide* residents of the community. (*Carrington v. Rash*, 380 U. S. 89, 13 L. Ed. 2d 675; *Dunn v. Blumstein*, 405 U. S. 330; *Evans v. Cornman*, 398 U. S. 419.) It is clear that the requisite intent to establish a bona fide residence in a prison simply cannot exist.¹

In *McDonald v. Board of Election* (394 U. S. 802), the appellants were unsentenced inmates in the Cook County jail. They were unable to vote by absentee ballot because there was no Illinois statutory provision therefor. The Illinois Statute did provide for absentee ballots for persons absent from their county of residence, those physically incapacitated and those whose religious observance or election duties precluded their attendance at their polling places.

¹ New York State Election Law § 151(a) states that "For the purpose of registering and voting no person shall be deemed to have gained or lost a residence * * * while confined in any public prison * * *."

In the instant appeal, the appellants are inmates of the Monroe County jail, either awaiting trial or as convicted misdemeanants. In New York State, persons who will be unavoidably absent from the county of residence on the occurrence of a general election or who are physically disabled on Election Day, may register and vote absentee (Election Law, §§ 117, 117-a and 153).

In *McDonald*, as in the instant appeal, there was not any statutory prohibition denying appellants the right to vote.² This is to be contrasted with *Goosby v. Osser* (____ U. S. ____, 41 L W 4167, [January 17, 1973]), in which the opinion of this Court (BRENNAN, J.) noted that "the Pennsylvania statutory scheme absolutely prohibits them from voting, both because a specific provision affirmatively excludes 'persons confined in a penal institution' from voting by absentee ballot" and because of the local election officials' refusal to provide alternative means for voting (41 L W 4170). The opinion in *Goosby* hastened to add that although *Goosby* was remanded for a hearing before a three-judge district court because of "significant differences" between the Illinois and Pennsylvania statutory provisions this Court did not decide or intimate any view on the merits.

In contrast, the New York statutes herein and the Illinois election statutes in *McDonald*, are almost identical as are the underlying facts in each case. There is no affirmative exclusion from voting. As was stated in *McDonald* (*supra* at p. 807): "It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots." Therefore, this appeal presents no substantial Federal question and should be dismissed.

² New York State Election Law, § 152 excludes convicted felons from the suffrage but not misdemeanants.

B. The New York Court of Appeals correctly held that there was no denial of appellants' constitutional rights.

The Court of Appeals properly applied the less stringent "reasonableness" test in this case since the statutes in question do not have a direct impact on the appellants' right to vote and "not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review" (*Bullock v. Carter*, 405 U. S. 134, 143, 31 L. Ed. 2d 92; see also *McDonald v. Board of Election*, 394 U. S. 802, 807; *Fidell v. Board of Elections*, 343 F. Supp. 913 affd. ____ U. S. ____ 41 LW 3245 [11-7-72] *Rosario v. Rockefeller*, ____ U. S. ____, 41 LW 4401).

The Court of Appeals noted that rather than denying appellants the right to vote, the statutes in question represent remedial legislation and should not have been rendered void merely because they do not encompass all possible categories of voters (*Matter of O'Brien v. Skinner*, 31 N Y 2d 317, 320; [cf. *McDonald, supra*, at p. 811]; *Fidell v. Board of Elections, supra*).

The persuasive and compelling authority of *McDonald v. Board of Election* (394 U. S. 802), left the Court of Appeals no alternative but to dismiss the petition herein and its order should be affirmed.

CONCLUSION

The Court should grant the motion to dismiss the appeal or to affirm the order of the Court of Appeals.

Dated: April 4, 1973.

Respectfully submitted,

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